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In the Supreme Court of the United States

OCTOBER TERM, 1975

MARIO LOBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the admission of evidence concerning his co-defendant's flight after commencement of the trial violated the principles of *Bruton v. United States,* 391 U.S. 123.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to traffic in narcotics, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to a term of 15 years' imprisonment and was fined $20,000. The court of appeals affirmed (Pet. App.).

The evidence showed the existence of a massive international narcotics conspiracy. Petitioner and Aurelio Martinez-Martinez, his co-defendant, purchased wholesale quantities of heroin and sold it to others for ultimate distribution. Three other persons who were involved in the scheme, Pierre Gahou, Alfredo Aviles, and Felix

Martinez, testified as principal government witnesses, directly implicating petitioner and Martinez-Martinez in the illegal conspiracy (see, *e.g.*, Tr. 94, 97-98, 101-102, 112-114, 116-117, 139-142, 146-150, 430-437, 439-441, 723-727, 729-730, 734-736).

Co-defendant Martinez-Martinez failed to appear for the fifth day of the trial (Tr. 628). A search of his hotel room failed to reveal any evidence that he had removed his personal belongings (Tr. 652). Jose Ferrer, a defense investigator who had been sharing the hotel room with Martinez-Martinez, informed the court that Martinez-Martinez had left the hotel on the preceding night to visit some friends, had twice telephoned to indicate that he would return later than anticipated, but had failed to return that night (Tr. 661, 665). The court then recessed for the weekend.

Efforts by the government and defense counsel to locate Martinez-Martinez over the weekend proved futile. The court thereafter found that Martinez-Martinez had voluntarily absented himself, and it ordered that the trial proceed in his absence (Tr. 696). After denying petitioner's motion for severance (Tr. 697-698), the court told the jury: "As you see, Mr. Martinez-Martinez is not present and I chose to proceed without him" (Tr. 711).

Before completion of the government's case, evidence of Martinez-Martinez's flight was introduced through the testimony of Ferrer (Tr. 1161-1169, 1176-1182) and of federal agents who had attempted to locate the fleeing defendant (Tr. 1200-1204, 1205-1207, 1207-1208, 1218-1220). At the time this evidence was introduced, the court instructed the jury as follows (Tr. 1170-1171):

> [I]f you credit the testimony, then you may infer from such testimony together with all the other evidence, a consciousness of guilt. * * *

> Now, this is a permissible inference, not an inference you must draw. * * * [The inference] only refers to the defendant Martinez-Martinez. It has nothing to do with [petitioner].

In its final instructions to the jury, the court again emphasized that this evidence "should not be charged in any way in determining the guilt or innocence of [petitioner]" (Tr. Instr. 63-64).

Notwithstanding the court's limiting instructions, petitioner contends that he was prejudiced by the evidence of Martinez-Martinez's flight. Even assuming, however, that the situation here is similar to one in which evidence is introduced concerning a co-defendant's extra-judicial admissions, it is settled that, so long as those admissions inculpate only the defendant who made them and do not implicate any of the other defendants, the principles of *Bruton* v. *United States*, 391 U.S. 123, are inapplicable. See, *e.g.*, *United States* v. *Mulligan*, 488 F.2d 732, 737 (C.A. 9), certiorari denied, 417 U.S. 930; *United States* v. *Davis*, 487 F.2d 112, 124 (C.A. 5), certiorari denied, 415 U.S. 981; *United States* v. *Lomprez*, 472 F. 2d 860, 863 (C.A. 7), certiorari denied, 411 U.S. 965.

Petitioner claims that the evidence of flight did inculpate him because other evidence linked the two men in the conspiracy. As the court of appeals stated, however (Pet. App. 28):

> We fail to see * * * that Martinez-Martinez's decision to flee implied the guilt of anyone but himself; indeed, Lobo's continued presence, by contrast, might have been viewed by the jury as belief in his own innocence.

Petitioner's claim is one that could be made in almost every joint trial. Following it "to its logical conclusion would require separate trials in every case where any defendant has made an admission. Such a holding is wholly unwarranted" (*United States* v. *Mulligan, supra,* 488 F. 2d at 737).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.